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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

SUZANNE MARIE BILANCIA, fka,
SUZANNE MARIE BILANCIA BEMIS,

Petitioner/Appellant,

v.

CHRIS THOMAS BEMIS,

Respondent/Appellee.

Appellate No. 20010364-CA

Argument Priority No. 15

District Court 994500457 DA

APPELLANT'S REPLY BRIEF

Appeal from the Judgment and Orders of the District Court
of the Fifth Judicial District, State of Utah
the Honorable J. Philip Eves, Presiding.

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FILED
Utah Court of Appeals

FEB 20 2002

Paulette Stagg
Clerk of the Court

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ARGUMENT

Issue No. 1

The Lower Court Improperly Considered Items

Outside The Scope of The Final Decree

In the Appellee's brief, he states that the Divorce Decree in this action is unique. This is true. The Appellee then goes on to state that the trial court was simply entering a final order concerning alimony as the first order was only a temporary order. This is false. The order, agreed to by the parties and entered by the court in the original divorce action, was a final order. The only portion of the order that was subject to review after one year was whether the alimony would continue or terminate. This is evidenced by the trial court's own language when the Judge stated that

"the issue of continuing or terminating the alimony provision is before the court properly in this motion. But increasing requires a modification of the agreement of the parties that led to the stipulated divorce decree. And I think that brings into play on that particular issue rule 6-404 of the Utah Code of Judicial Administration, which requires the filing of a petition and service of a summons and the whole provision." (R. 128-129).

If the amount of alimony could not be changed pursuant to the motion before the court, then it is obvious that this was not a temporary order, but a final order.

The only part of the order that could change was the duration, and the Decree stated that the only criterion to determine continuation or termination by motion would be the Appellant's

disability status. In other words, if Ms. Bilancia's disability continued, then so would the alimony, but if her disability were discontinued, then she would be eligible for work and alimony would terminate.

While the trial court may have concluded that Mr. Bemis did not have the ability to pay alimony, this matter is completely irrelevant to the issues before the trial court. As previously stated, the only area of interest in the action was whether or not the appellant's disability continued or not. If it continued, as the trial court found it did, then the alimony must be continued. If the appellant's disability had not continued, then alimony would have had to terminate. The appellant does not dispute the findings of fact by the court, only the application of those findings to the decree and the law. The trial court based its decision to terminate the appellant's alimony on impermissible facts and therefore, the trial court's decision should be overturned and Appellant should have her alimony award reinstated.

Issue No. 2

Res Judicata Applies to a Modification of The Decree of Divorce

As pointed out above, the alimony award was a final order. The only changeable portion of the order was the duration which would only change after at least one year and depending solely on the Appellant's disability status.

It is painfully obvious that the Decree left only enough room to continue or terminate alimony based solely on the Appellant's continuing disability status. Any other changes, as correctly pointed out by the trial court, would have to be made pursuant to a petition to modify the Decree. Interestingly, there was no petition to modify and there was no argument or evidence introduced by the Appellee that reflected the intent of the parties in regard to the meaning of paragraph 15 of the Decree of Divorce. In light of this, the Macris & Associates, Inc. v. Neways, Inc., 16 P.2d 1214 (Utah 2000) decision, cited by the Appellee as supporting his conclusion that this is not a final order, in fact supports the Appellant's point of view that this is a final order. In this case, the order is final. The only issue for the court was whether to continue or terminate alimony on certain grounds outlined in the stipulation and Decree. As there was no reservation of the issue of amount or any other factor, including ability to pay, the order is in fact res judicata as to all items except those specifically reserved as was the continuation or termination based solely on the continuing status of the Appellant's disability. Therefore, Res Judicata does apply to the order including the Appellee's ability to pay, and any deviation, except what was specifically authorized by the decree, had to be done by modification. As there was no modification filed, and there was specifically found to be no substantial or material change of circumstances, the trial court overstepped its bounds by terminating alimony based on the

Appellee's ability to pay.

Issue No. 3

The Trial Court Did Violate Both U.C.A. 30-3-5

And Rule 6-404 of The U.R.J.A.

As previously pointed out, the court did in fact violate the provisions of Utah Code Annotated Section 30-3-5 and Rule 6-404 of the Utah Rules of Judicial Administration. The Appellee completely misconstrues the Appellants arguments in regards to the necessity of filing a modification action to come to the result the court reached. Appellee states that the "decree applies equally to both parties, and the rules apply equally to both parties." This is in fact what the Appellant has argued from the beginning. Plainly put, the decree states that alimony would continue or terminate based on the Appellant's disability status. Therefore, if the disability continues, so does alimony, and if the disability ends, so does alimony. This is what was provided in the stipulation of the parties and in the final decree of divorce. For the court to go beyond the decree and look into different areas and make substantive changes to the decree without a petition to modify is error, and the same is a violation of both U.C.A. 30-3-5 and Rule 6-404 of the U.R.J.A..

Issue No. 4

The Trial Court Abused Its Discretion And Wrongly Applied

The Law to Terminate The Appellant's Alimony

The final argument submitted by the Appellee, simply put, is not well founded. The Appellee's complete argument is simply that for failure to marshal the evidence as required by Moon v. Moon, 973 P.2d 431 (Utah Ct. App.), the court should affirm the trial court's order. It is true that Moon requires a party who is attempting to challenge the findings of fact of the trial court to marshal the evidence in the manner presented by the Appellee's argument. However, the Appellee negates to mention that it is not the finding of fact itself that is relevant here. It is, in fact, the application of those facts made by the trial court to the Decree and the law which is most relevant.

It would be error to affirm the trial court's decision "based on plaintiffs' failure to show the findings of fact to be unsupported." Saunders v. Sharp, 806 P.2d 198, (Utah 1991); See also; Dishinger v. Potter, 424 Utah Adv. Rep. 31, 2001 UT App. 209. In fact, the Supreme Court of Utah Stated that "[i]f the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case. Saunders, 806 P.2d at 199; See also Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

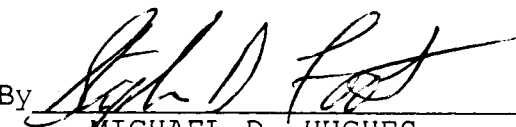
In this case, there were irrelevant findings of fact which were incorrectly relied upon by the trial court in making its decision. The application of the relevant findings of fact made by the trial court leaves only one possible decision, and that is to continue alimony.

Conclusion

In the instant case, the lower court, absent subject matter jurisdiction, has attempted to utilize equity to give rights back to the Appellee which he voluntarily contracted away in his stipulation and subsequent Decree of Divorce. In so doing, the lower court has emaciated the principles of res judicata, and circumvented even the parties' own stipulation. The court's decision is, thus, not only legally violative of the doctrine of res judicata, but obviates the provisions of U.C.A. 30-3-5 and Rule 6-404 of the U.R.J.A.. Appellant, once again, requests that the Appellate Court reverse the decision with specific instructions to the lower court to reinstate alimony pursuant to the Stipulation and Decree previously entered.

RESPECTFULLY SUBMITTED this 20th day of February, 2002.

HUGHES AND BURSELL, P.C.

By 
MICHAEL D. HUGHES
STEPHEN D. FOOTE

I, Stephen D. Foote, certify that on February 20, 2002, I served two copies of the attached Appellant's Reply Brief upon Lamar Winward, the counsel for the appellee in this matter, by hand delivering the same to him at the following address:

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